92-266

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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ORIGINAL

SUNSHINE PERIOD

April 6, 1994

Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, D.C. 20554

Re: **MOTION TO STRIKE AND TO IMPOSE SANCTIONS**

Dear Mr. Caton:

Attached please find an original and four copies of the above referenced filing for Encore Media Corporation. Should you have any questions regarding this filing, please contact the undersigned counsel.

Sincerely,

James E. Meyers

James E. Meyers

cc with enclosures: Andrew S. Fishel, Managing Director
Chairman Reed Hundt
Commissioner James H. Quello
Commissioner Andrew C. Barrett
Sandy Wilson, Esq.
Pat Donovan, Esq.

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SUMMARY

Encore Media Corporation ("Encore") legally and permissibly met with decision-making personnel of the Commission to discuss its programming concepts on the "multiplexing" of premium service offerings and the application of the Commission's rate regulations thereto. Additionally, Encore filed the required ex parte notice in conjunction with a request for clarification of the multiplex rules. Subsequently, after the commencement of the Commission's "sunshine period" and in complete contempt of the FCC's rules, Showtime Networks, Inc. ("SNI") filed a euphemistically captioned "Request for Declaratory Ruling" directly responding to Encore's Request for Clarification and impermissibly arguing the very issues which were being considered during the sunshine period.

SNI was aware that its contact was outside the rules and designed its filing to influence the Commission into either: (i) refusing to act on the Encore-related issue or (ii) into adversely acting on that issue.

The Commission should strike the SNI pleading and impose against the filing party and its filing counsel any sanctions deemed appropriate by the Managing Director.

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)
Request for Declaratory Ruling Regarding the Multiplexing and Negative Option Provisions of the Commission's Rules	)
To: The Commission and The Managing Director	)

MOTION TO STRIKE AND TO IMPOSE SANCTIONS

Encore Media Corporation ("Encore") hereby moves the Commission to strike the above-styled "Request for Declaratory Ruling" ("Request" or "Captioned Document") filed by Showtime Networks, Inc. ("SNI") on March 17, 1994.[1]

The Request was filed with the Commission during the "sunshine period" of 47 C.F.R. Section 1.1203 wherein the Commission had under consideration various Reports and Orders and Orders on Reconsideration in MM Docket No. 92-266, a proceeding pertaining to cable television rates and service offerings. Beyond the shadow of a doubt, the styled "Request" is not a Section 1.2 request for a declaratory ruling, but rather is a prohibited ex parte presentation and must be stricken. As the counterpart of its motion, Encore requests that the Managing Director render a determination

[1]See Cover Page of Request enclosed as Attachment A.

pursuant to Rule 1.1212(e) and apply to SNI the appropriate procedures as specified in Section 1.1212 and sanctions as specified in Section 1.1216.[2]

The filing makes a mockery of the Federal Communications Commission's ("FCC" or Commission") deliberative process. It effectively says: "Notwithstanding the Commission's Rules, parties can choose to make presentations to the FCC on matters under consideration during the sunshine period, simply by calling it something 'different.'" No company, no matter how successful and no matter by whom represented, can place itself above the law. It cannot be countenanced.

BACKGROUND

On February 14, 1994, Encore representatives met with decision-making personnel of the FCC to discuss clarification on the multiplexing of premium service offerings over cable television systems and the application of the Commission's rate regulations thereto. Specific issues discussed included how multiplex premium services pertain to the definition of cable programming service and a la carte packaging, which were issues under active reconsideration by the Commission in MM Docket No. 92-266.

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[2]Among the sanctions available to the Commission is dismissal of the pleading. The Commission may also admonish or censure the filing party.

In accordance with the "permit but disclose" requirements of the FCC's ex parte rules, on February 15, 1994, counsel for Encore filed Notification of that permissible ex parte communication ("Ex Parte Notice") with the Secretary's office under Docket No. 92-266 -- the two page summary attached to the Ex Parte Notice -- in conjunction with a formal request for clarification ("Clarification Request") outlining Encore's understanding of the multiplex exemption scope and legal underpinnings for such scope.[3] The Commission's "sunshine period" began shortly thereafter. From that point, ex parte communications on matters under consideration in Docket 92-266 were strictly prohibited until the sunshine period was automatically terminated on March 30, 1994, pursuant to the publication and release of the "Benchmark Order".[4]

Notwithstanding this clear and specifically articulated prohibition, SNI, through its counsel, Wiley, Rein & Fielding, filed the Captioned Document, without a docket number, euphemistically styled as a "Request for Declaratory Ruling," but blatantly acknowledging that it was made "as a

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[3]A copy of the Ex Parte Notice is attached hereto as Attachment B.

[4]Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking in MM Docket No. 92-266, released March 30, 1994.

response to a requested clarification sought by" Encore.[5] Moreover, SNI brazenly attached as an exhibit the very submission Encore made to Docket No. 92-266, and which fully complied with the ex parte rules.

ARGUMENT

I. SNI's Actions Reflect Unbridled Arrogance and Contempt for The Commission's Clearly Defined Ex Parte Rules.

A. The FCC's Ex Parte Rules Clearly Prohibit Certain Communications During the Sunshine Period.

When the Commission amended its ex parte rules in 1987[6], it specifically noted and incorporated at Section 1.1201 of the Rules that the purpose of the Rules was to ensure that the agency's decisions were based upon publicly available information and not after-the-fact lobbying.

As part of that determination, the Commission expanded its definition of the term "ex parte presentation" to conform more closely to Section 557(d)(1)(B) of the Administrative Procedure Act, 5 U.S.C. § 557(d)(1)(B). Accordingly, that revised definition of ex parte "presentation" encompasses any type of communication addressing any issue, procedural or substantive, going to

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[5]Encore's "Clarification Request" addressed the same Docket No. 92-266 matters that the Encore representatives discussed this in their ex parte meetings referenced in Encore's Ex Parte Notice.

[6]Ex Parte Rules, 62 RR2d 1775 (1987).

the merits of the relevant proceeding. 62 RR2d at 1764, para. 15. The Commission specifically acknowledged H. R. Rep. No. 880, which concluded that the legislative intent referred to communications "relative to the merits of the proceeding" and was "intended to be construed broadly and to include more than the phrase 'fact in issue' currently used in the Administrative Procedure Act." 62 RR2d at 1764, para. 15, n.10.

B. SNI Had Ample Opportunity, Outside of the Sunshine Period, to Raise Any Legitimate Multiplex Concerns.

1. The Ex Parte Rules Do Not Hinder A Party From Commenting, But Rather Establish A Time Frame For Commentary.

In amending its ex parte rules, the Commission also weighed the notion that establishing a sunshine prohibition "does not necessarily promote greater 'fairness among interested persons.'" In doing so, it observed that a sunshine prohibition does not hinder the notion of fairness and that the cut-off period "merely shifts the timing of last-minute presentations to an earlier time period." 62 RR2d at 1780, para. 71. Paramount to any concern over fairness to interested persons was the Commission's perception of the public interest that the sunshine period promotes:

> [I]t provides decisionmakers with a "period of repose" during which they can be assured that they will be free from last minute interruptions and other

> external pressures, thereby promoting an atmosphere of calm deliberation....The period of repose provided under the Rule adds further assurance that the Commission decisions are made free from "any hint of external pressure" and are "as objective and well reasoned as possible." This, in turn, leads to increased "confidence of the public and the courts" in the agency's work.

65 RR2d at 1780, para. 72 (Emphasis added).

Additionally, the Commission noted in adopting the sunshine period that what it had said before in response to those who believed that fairness would be promoted by permitting ex parte contacts during final deliberations still held true: "'Interested persons...have plenty of time to present their views on a pending matter before the cut-off period begins and they...have additional time after the Commission acts if the matter is still subject to reconsideration.'" 62 RR2d at 1780, para. 71 (citation omitted). As the following points demonstrate, this is clearly a case where the party, SNI, could have -- and should have, assuming it had legitimate concerns -- made its filing before the sunshine period.

2. Encore's Multiplex Position Has Been Widely Documented and Publicized for Almost a Year.

Encore cleared its multiplex plan with the FCC, then publicly announced, explained and promoted its multiplex plans in May 1993, and regularly thereafter, in industry trade publications, at national and regional industry

conventions, in industry panel discussions and more.

Accordingly, assuming that SNI representatives have not turned a deaf ear to industry news, it would be disingenuous at best for them to cry lack of knowledge about Encore's multiplex plans and the fact that Encore was communicating with the FCC about its plans.

3. SNI's Counsel of Record on the Request Knew of Encore's Multiplex Plan, in Detail, as of Mid-December, 1993.

Indeed in an effort to assist cable operators in understanding Encore's multiplex plan and the legal basis therefore, Encore representatives met with primary communications counsel for various MSO's, including attorneys of Wiley, Rein and Fielding ("Wiley, Rein"). The meeting with the Wiley, Rein attorneys was held in mid-December, 1993, more than a month before the sunshine period on Docket 92-266 began.

In that meeting, Encore representatives disclosed to the Wiley attorneys detailed data about Encore's multiplex plans, legal underpinnings of the plan, and the fact that Encore had presented its plan to the FCC staff and Commissioners and received both confirmation and encouragement thereof. Additionally, the Encore representatives provided the Wiley, Rein attorneys with written materials reflecting the above and various trade advertisements and speeches discussing the plan.

Interestingly, some of the written materials Encore provided to the Wiley, Rein attorneys during that meeting found their way, either intact or as excerpts, into the exhibits of SNI's Request. See Request Exhibits A and B. In light of the above, it is clear that the Wiley, Rein law firm in fact knew of Encore's multiplex plans and basis therefor prior to the sunshine period commencement. Moreover, as one of the attorneys attending that meeting is a signatory to SNI's Request pleading, and hence obviously was instrumental in preparing the pleading, one can assume that SNI also knew of Encore's plans and basis therefore prior to the sunshine period commencement.

4. SNI and Its Parent Company, Viacom, Were Parties to Docket No. 92-266.

SNI cannot deny that it has been a party to the proceeding or that it and its counsel were intimately familiar with the issues raised in the proceeding and with the identity of the parties. Indeed, SNI which is a wholly-owned subsidiary of Viacom International, Inc., has shared with Viacom in the Docket 92-266 proceedings the same legal counsel, Wiley, Rein & Fielding. That Viacom has been an active participant in MM Docket No. 92-266 is obvious. See Attachment A to the Second Order on Reconsideration in MM Docket No. 92-266. Indeed, Viacom International, Inc.'s Petition for Reconsideration expressly dealt with

interpreting the "cable programming service" definition.[7] As such, SNI can be presumed by even the most naive of observers to be aware of the scope of the proceeding and thus to have realized that its Request was an improper filing.

5. SNI's Contempt For The Commission's Processes Seem Almost Limitless.

SNI's contempt for Commission processes is further manifested by its failure to serve Encore. For nearly two decades, the Commission has recognized the unique circumstances of the cable industry. Indeed, Petitions for Special Relief -- of a kind to the instant Request -- shall be served on any interested person.[8] Yet, SNI notwithstanding even attaching a copy of Encore's Notification, did not deign to serve Encore.[9]

Truly, SNI's submission is an example of regulatory over-reaching. Not content with being part of the corporate winner of one of the largest contested take-overs in media

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[7]See Petition for Reconsideration of Viacom International, Inc. in MM Docket No. 92-166 (filed June 21, 1993) at 24.

[8]47 C.F.R. §76.7(b). See also Carthage Cablevision, Inc., 64 FCC 2d 545 (1977); Colonial Cablevision of Revere, Inc., 77 FCC 2d 56 (1980).

[9]SNI's actions become even more offensive when literally hours were spent in the Commission's files attempting to locate a copy of the pleading which had no file number attached to it and to this date has not appeared on Public Notice. One can only wonder if SNI's actions constituted a deliberate attempt to keep knowledge of the filing to a minimum.

history, not content with the successful operation of Showtime Network and its progeny, SNI has deemed it advantageous, through its counsel, Wiley, Rein & Fielding, to resort to abusing the Commission's processes in an attempt to thwart the growth of a nascent competitor and preclude its owner[10] from developing and offering a novel concept which fully complies with the Cable Act and corresponding FCC regulations and in which Encore has already invested enormous financial, personnel and other resources on the understanding that its plan passed both Congressional and Commission muster.

The backdoor approach adopted by SNI certainly does not comport with the FCC's policy of open and fair government. That this is a product of the law firm of a former and respected Chairman of the Commission is even more egregious since one would expect SNI's counsel to be cognizant of and responsive to the FCC's rules. In light thereof, SNI's Request reflects a decision to play by its own rules rather than the Commission's.

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[10]Encore Media Corporation is 90% owned by Liberty Media Corp. and 10% owned by minority entrepreneur John J. Sie, who serves as Chairman and Chief Executive Office of Encore. Mr. Sie and not Liberty Media or any other entity is responsible for the day-to-day operations of Encore. Indeed, Encore's Thematic Multiplex concept was developed solely by Mr. Sie.

II. SNI Knows or Should Know That Its Claims and Innuendo About The Merit of Encore's Multiplex are Baseless.

As previously shown, Encore's multiplex plans and the legal basis therefore have been widely publicized for almost a year and were in fact known to the law firm that prepared SNI's Request prior to the sunshine period commencement. Additionally, as the Commission is well aware, Encore has fully disclosed its proposed multiplex strategy at every step since May 1993 and has carefully addressed all issues of Congressional intent, continuously receiving encouragement from all levels at the Commission, including the praise of the then-Chairman in his speech to the National Cable Television Association in June 1993. Accordingly, SNI's claims are totally baseless.

CONCLUSION

SNI's submission of a "Request for Declaratory Ruling," which directly responds to Encore's permitted submission in a non-restricted proceeding, is a blatant ex parte presentation made directly to decision-making personnel during the sunshine period. It was precisely the type of communication and may have had precisely the result that Section 1.1203's sunshine period prohibition was designed to prevent. As a result of SNI's impermissible filing, the Commission may have been influenced. The Commission, in its "Benchmark Order" in MM Docket No. 92-266, set aside for a

separate proceeding further clarification of the multiplex aspect of the definition of "cable programming service."

Styling the submission as a "Request for Declaratory Ruling" does not mask the fact that the Request was intended to -- and did -- address issues in and attempt to influence the outcome of a proceeding which was subject to the sunshine period prohibition.[11]

Accordingly, SNI's styled "Request for Declaratory Ruling" should be stricken. Encore hereby requests that the Managing Director exercise the authority granted by Section 1.1212(e) of the Rules, and notify all parties to MM Docket No. 92-266 that a prohibited ex parte communication has occurred, and to provide service or notice of such presentation as required. Encore further requests that the Managing Director impose such sanctions as may be appropriate pursuant to Section 1.1216 of the rules, including measures pursuant to Section 1.24 of the rules.

Respectfully submitted

Yvonne Bennett by JEH

Yvonne Bennett
Director, Business Affairs and
General Counsel

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[11]Nor may SNI seek refuge in the Section 1.1204(a)(8) exemption for requests for declaratory rulings. Even a valid, non-pretextual, request for declaratory ruling is subject to the sunshine period prohibition. 47 C.F.R. § 1.1204(a).

Attachment A

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MAR 17 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)
	)
Request for Declaratory Ruling	)
Regarding the Multiplexing	)
and Negative Option Provisions	)
of the Commission's Rules	)

To: The Commission

REQUEST FOR DECLARATORY RULING

Showtime Networks Inc. ("SNI"), by its attorneys, hereby requests a declaratory ruling regarding the Commission's definition of "multiplexed or time shifted" programming and its interpretation of the "negative option" prohibitions of the Commission's rules. This request is made, in part, as a response to a requested clarification sought by Encore Media Corporation ("Encore") on February 15, 1994 (a copy of which is attached as Attachment 1).

Specifically, SNI seeks a determination (1) whether a packaged offering of several separate, commonly-owned, program services -- each consisting entirely or predominantly of different programming -- is a "multiplexed or time shifted" per channel service (or tier or package of per channel offerings) exempt from rate regulation when such programmatically distinct services are not also made available separately on a per channel basis; and (2) whether and under what circumstances the charges and service components of a "multiplexed or time shifted" service can be changed without the affirmative consent of the subscriber.

Attachment B

BARAFF, KOERNER, OLENDER & HOCHBERG, P. C.

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ROBERT BENNETT LUBIC

FAX: (202) 686-2828

February 15, 1994

BY HAND

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Re: MM Docket No. 92-266

Dear Mr. Caton:

On February 14, 1994, representatives of ENCORE MEDIA CORPORATION and the undersigned met with Chairman Hundt, his assistant, Karen Brinkmann, Maureen O'Connell of Commissioner Quello's office and James Coltharp of Commissioner Barrett's office. Our meetings began after 3:00 p.m. and did not conclude in time to notify you before the close of business on the 14th, but we are doing so this morning.

The purpose of the meetings was to discuss a clarification of the manner in which premium services offered over cable television systems may be multiplexed consistent with unregulated program service offerings. We have submitted this date the substance of our recommended clarification.

We also discussed the packaging of a la carte video program service offerings.

Very truly yours,

James E. Meyers

James E. Meyers
Counsel for
Encore Media Corporation

cc (w/enc.) BY HAND
Reed Hundt
Maureen O'Connell
James Coltharp

Recommended Clarifications to Paragraph 326 of Rate Report & Order, dated May 3, 1993, FCC 93-177.

In our First Rate Report & Order, consistent with Congressional intent, we "exclud[ed] from the definition of cable programming service per-channel or per-program premium services offered on a multiplexed or time-shifted basis" and concluded that such services will therefore not be subject to rate regulation complaints so long as they consist of "commonly-identified video programming." In this Report and Order, we aim to further clarify: (i) what services are covered by the multiplex exemption, (ii) the applicable meaning of the term "multiplex", and (iii) the scope and nature of the multiplex exemption within the Rate Regulation provisions of the Cable Act.

The legislative record is clear[1] that the exemption from rate regulation applies only to "Premium Service(s)" that have already multiplexed or which multiplex in the future. It does not apply to non-premium services that cable operators choose to offer on a per-programming, per-channel or pay-per-view basis.[2] Congress at House Report pages 79 and 90 defines Premium Service(s) as a service(s) that traditionally and historically was offered on a per channel basis. We recognize that per-channel, per-program service offerings that are Premium Service(s) are those that were so offered [upon enactment of the Cable Act] [upon the issuing date of the House Report]. Although neither Premium Service(s), as defined above, or other service(s) offered on a per channel per program basis are subject to rate regulation when offered as stand alone or single per channel offering(s), the multiplex exemption applies only to Premium Service(s).

Multiplexing is defined as the offering of multiple channels of commonly identified video programming as a separate tier.[3] The House Report uses HBO and its two multiplexed channels (HBO2 and HBO3) as an example of multiplex premium channels.[4] HBO is the premium channel and HBO2 and HBO3 are the multiplexed channels of HBO. To the extent that the Act provides tier exemption to the experimenting of multiplexing, of Premium Services(s), the scheduling patterns of the commonly identified video programming on

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[1]H. Rep. 102-628, 1022 Cong., 20 Sess. (June 29, 1992) ("House Report"), at pp. 80, 90.

[2]Id.

[3]House Report, p. 80.

[4]For purposes of clarifying the multiplex exemption, we use HBO throughout for illustrative purposes only, and note that the references to HBO apply equally to all other premium services (e.g., Encore, Showtime, Disney).

the multiplexed channels of Premium Service(s) can be quite broad on a monthly basis.[5] Programmers' scheduling options include, but are not limited to: (i) Time Shifting -- taking the same mix of titles on the Premium Service during the month and scheduling them during different dayparts on the different multiplex channels for greater viewer choice;[6] (ii) counter-programming either by demographics (male, female, teens like HBO's multiplex) or by genre (love stories, mystery, etc. like Encore's Thematic Multiplex); and/or (iii) by offering more variety of choices such that the expansion of the Premium channel (e.g., HBO) to its multiplex channels would offer consumers additional unduplicated programming over that which would appear on the Premium channel (e.g., HBO) within any given month.

The Multiplexed Premium Service(s)/Channel(s), when offered as a separate tier, should be treated for rate regulation purposes in the same manner as a single channel premium service, (e.g., to the subscriber of HBO when HBO expands to its multiplex offering of HBO, HBO2, HBO3 tier, as long as all HBO subscriptions on the system after the multiplex tier is introduced come only in the form of the multiplex tier, no new per-channel services are deemed to have been added to the system). However, with the permission of the video programming vendor, a cable operator(s) may choose to offer any of the multiplexed premium channel as stand alone single channel purchase option(s) and such per-channel offering(s) are likewise not subject to rate regulation.[7]

For purposes of a la carte packaging, pursuant to paragraph 327 of our First Rate Report and Order, Multiplexed Premium Service(s) tiers are treated as single channel Premium Services(s) without any distinction.

We note, however, that where a cable operator bundles an entire Multiplex Premium Service tier or any individual multiplexed channels with a regulated service tier, such bundled multiplexed channels are subject to rate regulation.[8]

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[5]We note that most premium services are offered on a monthly subscription basis.

[6]For example, The Disney Channel's recommended multiplex consists of using East Coast and West Coast feeds three hours apart.

[7]House Report, pp. 79-80. We note that the House Report, page 80, states that multiplex channels may be offered either as "a separate tier or as a stand alone purchase option." (Emphasis added).

[8]First Rate Report and Order, p. 206, para. 326.

CERTIFICATE OF SERVICE

I, Marianne C. Lynch, certify that I have this 6th day of April, 1994, sent by regular United States mail, postage prepaid, a copy of the foregoing "MOTION TO STRIKE AND TO IMPOSE SANCTIONS" to:

Richard E. Wiley, Esq.
Wiley, Rein & Fielding
1776 K Street, NW
Washington, D.C. 20006

By: _____
Marianne C. Lynch